

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KEN MARABLE,

Plaintiff,

v.

MARK NICHTMAN, et al.,

Defendants.

No. C05-1270MJP

ORDER GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT  
DISMISSAL OF PLAINTIFF'S  
CLAIM FOR INJUNCTIVE RELIEF

This case comes before the Court on Defendants' Motion for Summary Judgment Dismissal of Plaintiff's Claim for Injunctive Relief (Dkt. No. 18). Having reviewed the parties' briefs and all pertinent documents and exhibits, the Court GRANTS Defendants' Motion for Summary Judgment. Plaintiff's claim for injunctive relief is hereby DISMISSED.

BACKGROUND

Plaintiff Ken Marable worked for the Washington State Ferry System ("WSF") for the last thirty-two years. In that time, he attained the position of Chief Engineer and is the most senior person with that title in the ferry system. Around 2002, Marable claims that he became concerned about various forms of corruption that he was seeing on the job. Specifically, Marable alleges that he was vocal about the fact that the Special Projects program was a waste of tax-payer money designed to pad the pockets of a group of managers he dubs the "Inner Circle." He also alleges that members of the "Inner Circle" failed to write down key information in the ferry logs, which both compromised the safety of the vessels and allowed members of the "Inner Circle" to collect undeserved overtime when other ferry employees were forced to call them at home to find out the status of the ships.

1 Mr. Marable states that he, along with other ferry staff, complained about these abuses and  
2 were targeted as whistle blowers. He claims that Mark Nichtman, former Director of Preservation  
3 and Maintenance of the WSF and Richard Phillips, a Staff Chief Engineer at the WSF, (both allegedly  
4 members of the "Inner Circle") in particular targeted him for his vocal disapproval of their allegedly  
5 corrupt ways. He complains that both Mr. Nichtman and Mr. Phillips knew that Mr. Marable was  
6 allergic to a cleaning substance known as Oil Eater 99. This substance allegedly caused Mr. Marable  
7 to have serious difficulty breathing. Although Mr. Marable alerted Mr. Nichtman and Mr. Phillips on  
8 several occasions about his difficulties with this substance, they continued to use it on board the  
9 ferries. In October 2002, Mr. Marable alleges that he communicated his problems with Oil Eater 99  
10 ("Oil Eater") to Mr. Phillips, who replied, "I have it and I'll use it, then you'll be gone." (Compl. at  
11 6). Mr. Marable alleges that he tried to remove the containers of Oil Eater from the ferry himself, but  
12 that removal of this substance was seen as an act of insubordination.

13 Mr. Marable also alleges that in order to combat the failure to write down key status notes in  
14 the ship's log by management, he installed a tape recorder in the ferry upon which he worked, and  
15 used it to record phone instructions given to him. This act was also perceived by management to be  
16 one of insubordination, as well as a violation of Washington law. On November 13, 2002. Mr.  
17 Marable received a letter from Mr. Nichtman that charged him with acts of insubordination, criminal  
18 conduct, and discourtesy. These charges allegedly stemmed from Mr. Marable's actions with the Oil  
19 Eater and the recording device. However, Mr. Marable claims that these charges were brought  
20 against him in retaliation for his criticism of the Special Projects programs and the management's use  
21 of overtime.

22 On December 16, 2002, a disciplinary hearing was held regarding the charges pending against  
23 Mr. Marable. Mr. Nichtman acted as the presiding fact-finder at this hearing, which Mr. Marable  
24 claims was a conflict of interest because Mr. Nichtman was significantly biased against him. At the  
25 end of the hearing, Mr. Nichtman found Mr. Marable guilty of the behavior with which he was  
26 charged and gave Marable a suspension from his duties without pay that lasted for two weeks. Mr.

1 Marable claims that his suspension was further retaliation for his whistle blowing activities. In  
2 connection with this claim, Mr. Marable brings a claim against Douglas MacDonald, the director of  
3 the Washington State Department of Transportation, Mark Nichtman, and Richard Phillips in their  
4 official capacities and is demanding injunctive relief to protect his Constitutional rights and to prevent  
5 Defendants' from firing him. It is this claim that is the subject of the current motion.

## 6 ANALYSIS

### 7 I. Summary Judgment Standard

8 Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City  
9 of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying  
10 facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus.  
11 Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Summary judgment will not lie if . . . the  
12 evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v.  
13 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the  
14 burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H.  
15 Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party has met its initial burden,  
16 the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an  
17 element essential to that party's case, and on which that party will bear the burden of proof at trial.  
18 Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving  
19 party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine  
20 issue for trial. Id. at 324.

### 21 22 23 II. Summary Judgment on Plaintiff's Claim for Injunctive Relief

24 Plaintiff Marable requests injunctive relief against all Defendants in their official capacities, "to  
25 protect the rights of Plaintiff under the U.S. Constitution." (Compl. at 12). Defendants point out that  
26 the claim for injunctive relief is the only cause of action brought against Defendant MacDonald.

1 Defendants argue that they are entitled to summary judgment on Defendant Marable's prayer for  
2 injunctive relief because he cannot demonstrate a likely threat of future injury and because his request  
3 for injunctive relief, without more, is too vague to be sustained. Plaintiff Marable, on the other hand,  
4 states that because he is bringing First Amendment claims, irreparable harm is presumed and that the  
5 level of scienter he is alleging on the part of Defendants makes his claims eligible for injunctive relief.  
6 If the Court is not willing to grant a permanent injunction at this stage, he requests a preliminary  
7 injunction.

8 Here, the Court finds that the Defendants have the better argument. To obtain a preliminary  
9 injunction, Mr. Marable must show: 1) that he will suffer irreparable injury if relief is denied; 2) that  
10 he will probably prevail on the merits at trial; 3) the balance of potential harm favors him; and 4) the  
11 public interest favors granting injunctive relief. International Jensen, Inc. v. Metrosounds U.S.A.,  
12 Inc., 4 F.3d 819, 822 (9<sup>th</sup> Cir. 1993). The Ninth Circuit has also adopted an "alternative test" for  
13 making the determination of whether or not to grant injunctive relief. Specifically, "the moving party  
14 may meet its burden by demonstrating either: (1) a combination of probable success on the merits and  
15 the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions  
16 going to the merits and that the balance of hardships tips sharply in its favor." Id.

17 Although Mr. Marable is alleging that his First Amendment rights were denied and that he  
18 suffered irreparable harm for this reason, he has not alleged that this harm is ongoing, nor has he  
19 shown that it is likely to be repeated. The Supreme Court has commented that "past wrongs do not  
20 in themselves amount to [a] real and immediate threat of injury." City of Los Angeles v. Lyons, 461  
21 U.S. 95, 103 (1983). Although evidence of past wrongs may certainly be taken into account by a  
22 Court as evidence of the likelihood of future wrongs, the burden to show that future injury is likely  
23 rests with the Plaintiff. Nelsen v. King Co., 895 F. 2d 1248, 1251 (9<sup>th</sup> Cir. 1990); see also O'Shea v.  
24 Littleton, 414 U.S. 488, 496 (1974). In the case at hand, Plaintiff has not made such a showing. First  
25 of all, Defendant Nichtman, who appears to be the main alleged aggressor in Plaintiff's narrative, has  
26 been removed from his position as the Director of Preservation and Maintenance of WSF. Second,

1 Plaintiff admits that Oil Eater 99 was removed from the boat on which he worked following an  
2 alleged call made by OSHA directing WSF to remove this substance from the ferry. (Compl. at  
3 ¶3.17). Finally, most of the events alleged took place in 2002—four years in the past. Although there  
4 are a few allegations of isolated comments from supervisors up until 2004, there is no allegation that  
5 the alleged harassment continues to the present or is likely to occur in the future.


6 Whether or not the Plaintiff is likely to suffer future irreparable harm is the touchstone issue  
7 under both the traditional four-pronged preliminary injunction inquiry and the newer, alternative  
8 approach also sanctioned by the Ninth Circuit. Because Plaintiff has not made this showing, the  
9 Court hereby GRANTS summary judgment on his claim for injunctive relief.

10 CONCLUSION

11 Plaintiff has not raised an issue of material fact that he is in danger of any future, irreparable  
12 harm stemming from his allegations. The Court accordingly GRANTS Defendants' motion for  
13 summary judgment on Plaintiff's claim for injunctive relief.

14 The Clerk is directed to send copies of this order to all counsel of record.

15 Dated this 22<sup>nd</sup> day of August, 2006.

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18 Marsha J. Pechman  
19 United States District Judge  
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